View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Brigham Young University Law School

Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (cases filed before 1965)

1966

Marinda Day v. Lorenzo Smith & Son, Inc. : Petition For Rehearing

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Stephen B. Nebeker; Attorneys for Defendant and Respondent.

Recommended Citation

Petition for Rehearing, *Day v. Smith*, No. 10256 (1966).
https://digitalcommons.law.byu.edu/uofu_sc1/4772

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (cases filed before 1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

MARINDA DAY,
Plaintiff-Appellant

vs.

LORENZO SMITH & SON, INC., a Utah corporation,
Defendant-Respondent

Case No. 10256

PETITION FOR REHEARING

RAY, QUINNEY & NEBEKER
STEPHEN B. NEBEKER
300 Deseret Building
Salt Lake City, Utah
Attorney for Defendant-Respondent

WILFORD A. BEESLEY
15 East 4th South
Salt Lake City, Utah
Attorney for Plaintiff-Appellant

UNIVERSITY
OCT
FILED
JAN 5 - 1966
Clerk, Supreme Court, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

MARINDA DAY,
Plaintiff-Appellant

vs.

LORENZO SMITH & SON, INC., a Utah corporation,
Defendant-Respondent

PETITION FOR REHEARING

Case No. 10256

PETITION FOR REHEARING

Lorenzo Smith & Son, Inc., a Utah corporation, defendant and respondent herein respectfully petitions this Honorable Court for a rehearing and reargument in the above entitled case. The petition is based upon the following grounds:

POINT I.

PLAINTIFF FAILED TO OBJECT TO PATROLMAN SHERWOOD'S TESTIMONY ON THE GROUND NO PROPER FOUNDATION HAD BEEN LAID SO THE OBJECTION TO "ANY OPINION" WAS PROPERLY OVERRULED.

POINT II.

THE PATROLMAN'S TESTIMONY ON POINT OF IMPACT WAS NOT PREJUDICIAL.

POINT III.

THE COURT ERRED IN HOLDING THERE WAS NO PROPER FOUNDATION TO SUPPORT THE TESTIMONY OF PATROLMAN SHERWOOD.

WHEREFORE, the defendant and respondent, petitioner herein, prays that the judgment and opinion of the court be re-examined and a reargument permitted of the entire case.

Respectfully submitted,

RAY, QUINNEY & NEBEKER
STEPHEN B. NEBEKER
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, Stephen B. Nebeker, one of the attorneys for the defendant and respondent, do hereby certify that I have carefully examined and considered the foregoing petition for rehearing, know the contents thereof, and that in my opinion the same is well founded in point of law and is not made for the mere purpose of delaying the determination of said cause.

STEPHEN B. NEBEKER

TABLE OF CONTENTS

AUTHORITIES CITED

CASES:

TEXTS:

ARGUMENT

POINT I.

PLAINTIFF FAILED TO OBJECT TO PATROLMAN SHERWOOD'S TESTIMONY ON THE GROUND NO PROPER FOUNDATION HAD BEEN LAID SO THE OBJECTION TO "ANY OPINION" WAS PROPERLY OVERRULED.

In the original opinion handed down by this court it was held that a trial judge, in his discretion, may permit a qualified expert to give his opinion as to the point of the collision when a proper foundation for the opinion has been laid.

When the patrolman was asked where the point of impact was, he testifed:

A. "It was near the center line and my best opinion, it may have been—"

Plaintiff's attorney objected to the answer as follows:

> "I will object to *any opinion* your Honor." (Italics ours)

The objection made by plaintiff's attorney was a specific objection to "any opinion." Plaintiff's attorney did not object to the testimony on the ground *no proper foundation had been laid.*

The trial court did not commit prejudicial error by overruling the objection to "any opinion," because plain-

tiff's attorney failed to object on the ground a proper foundation had not been laid.

It is well settled that an objection to be good, must point out the specific ground of the objection, and if it does not do so, no error is committed in overruling it. A party is confined to the specific objections made by him and can have the benefit of no others. 53 Am. Jur. Sec. 137.

In 88 C.J.S. Trial Sec. 125 (b) the rule is stated as follows:

> "It is a rule of universal application that the objection is deemed to be limited to the ground or grounds specified and does not cover others not specified. In other words, where specific grounds are stated the implication is that there are no others, or, if others, that they are waived. A specific objection overruled will be effective to the extent of the grounds specified, and no further."

In Wigmore's work on evidence, Vol. I, Sec. 18 (Third Edition) the following rule is enunciated:

> "A specific objection overruled will be effective to the extent of the grounds specified and no further. *An objection overruled, therefore naming a ground which is untenable cannot be availed of because there was another and tenable ground which might have been named but was not.*" (Italics ours)

It is the duty of the objecting attorney to point out to the court and opposing counsel why the proffered testimony is improper.

It is only fair that the trial judge should have an opportunity to pass upon the precise question involved, and that the nature of the objection should be pointed out. Furthermore, opposing counsel should have an opportunity to remove the objection or supply the defect by other testimony.

Where evidence has been objected to as inadmissible for certain specified reasons, the objection will be deemed to be limited to the grounds which have been specified. Jones on Evidence Fifth Edition Sec. 976.

This court has previously held that an appellant is entitled to a review of testimony admitted over his objection only on the grounds stated in the objection. In *Obradovich v. Walker Bros. Bankers*, 80 Utah 587, 16 P. 2d 212, (1932) an action was brought to determine the title and ownership of two savings accounts. At the trial, appellant made an objection to testimony on the ground it was "irrelevent and immaterial self serving declarations on the part of the deceased." The objection was overruled. On appeal appellant claimed for the first time that the testimony was incompetent under the provisions of the dead man statute. This court held:

> "The objection being overruled, the appellant is entitled to a review of the ruling only upon the grounds stated and pointed out by his objection, which were irrelevancy and immateriality and "self serving statements on the part of the deceased." The objection was properly overruled, for the proffered evidence was both relevant and material. * * * Though we assume the witness because of her

> interest to be incompetent by reason of the statute to testify in this case, yet, under the state of the record we are satisfied that question is not before us. *The question not having been raised in the trial court, we do not feel at liberty to pass on the question now argued by appellant in this court for the first time.*" (Italics ours)

The following cases support the rule that a specific objection overruled will be effective to the extent of the grounds specified and no further. *Eggermont v. Central Surety & Insurance Company,* 24 N.W. 2d 809 (Iowa 1946) (Objection to testimony of declaration based on conclusion, overruled; objection based on hearsay, held, not presented on appeal); *Thornton v. Bench,* 360 P. 2d 1065 (Kansas 1961) (Plaintiff objected to admission of exhibit solely on ground of irrelevancy; plantiff's contention on appeal that the exhibit was hearsay, not considered); *Kagan v. Levenson,* 134 N.E. 2d 415 (Massachusetts 1956) (Having stated specifically the basis of their objection, the defendants, in fairness ought not to be permitted to urge other grounds in this court); *Teesdale v. Anschutz Drilling Co.,* 357 P.2d 4 (Montana 1960) (Hearsay objection not raised at trial, unavailable on appeal); *Jimison v. Frank L. McGuire, Inc.,* 355 P.2d 222 (Oregon 1960) (specific objection on appeal not presented to trial judge, not available); *Dobb v. Perry,* 145 S.W. 2d 1103 (Texas 1940) (A specific objection which has been overruled will be effective as a ground of complaint on appeal only to the extent of the grounds named).

An examination of the record shows that plaintiff's objections were properly overruled.

Q. (Mr. Nebeker) Give us your judgment.

Mr. Beesley: *Make the same objection, your Honor.*

The Court: Let's find out if he has a judgment or giving an opinion. If he is giving an opinion, he can't.

Q. Do you have a judgment as to where the point of impact occurred?

A. Yes.

Q. Will you tell us what that judgment is?

Mr. Beesley: *Objection, your Honor.*

The Court: It's overruled. He may give his judgment.

A. As near the centerline and probably a little bit west.

Mr. Beesley: *I object to any probability, your Honor.*

The Court: If you are confining it to your judgment—

Q. Just give us our best judgment.

The Court: You can tell us your judgment.

Mr. Beesley: *I believe he said the centerline.*

A. Near the centerline.

Q. Was it on the west or the east of the centerline?

A. Do I have to answer that "Yes" or "No?"

Q. Yes.

A. My opinion is no good?

Q. Just give us your judgment.

The Court: You can give your judgment, Sergeant.

A. My judgment, slightly to the west of the centerline.

Q. Would you say it was about a foot to the west of the centerline?

A. I think that would be a fair figure.

Q. It could have been a little further west? It could have been a little further east?

A. Yes (R. 183-184)

Plaintiff's general objection is obviously defective. One of the cardinal rules of evidence is that a general objection, if overruled, cannot avail the objector on appeal. See Wigmore Vol. I Sec. 18.

This court has held that a general objection which does not point out the ground upon which it is made, does not merit consideration.

In *Culmer v. Clift,* 14 Utah 286, 291, 47 Pac. 85 (1896) this court held that a general objection overruled did not merit consideration on appeal.

> "The objection did not point out the ground upon which it was made, and therefore does not merit consideration. The point of the objection should have been particularly stated, in order to entitle it to consideration. This is the uniform rule. *General objections to the admission of evidence are unavailable to the party making them, either on motion for new trial or appeal. The particular grounds of the objection must be stated, so that the trial court may understand the nature of the objection before passing upon it.*" (Italics ours)

The rule announced in the *Clift* case *supra* was cited with approval in *In Re Richards Estate*, 5 Utah 2d 106, 297 P. 2d 542 (1956) where this court said:

> "It is further to be noted that the only objection proponent made to the hypothetical question at the trial was the generalized one that it misstated testatrix' phsyical condition, and that it did not include some known factors, without specifying what the claimed defects were. The rule is that in order to preserve the objection for review on appeal the objector must point out specifically what she claims was erroneously included or omitted, which proponent failed to do." (Italics ours)

Plaintiff's objection to the patrolman's testimony was on the specific ground of "opinion" and "probability." Plaintiff made no objection on the ground of lack of proper foundation. Neither the trial judge nor defendant's attorney were given an opportunity to remove the objection. The objection to "any opinion" did not raise the question of lack of foundation. It did raise the question of whether or not point of impact was a proper subject for opinion testimony. That was a specific objection which this court has now held was untenable. This court has in effect ruled that the objection which plaintiff made at the trial is without merit but that an entirely different objection, that of lack of proper foundation, is well founded. It is respectfully submitted that it is manifestly unfair to this defendant and the trial judge for this court to hold that the specific objection which was made, was properly overruled, but an objection which was not made, should have been sustained.

Plaintiff waived her objection to the patrolman's testimony on the ground no proper foundation had been laid.

This court has by its decision in the instant case, overruled the *Obradovich* case supra, *Culmer v. Clift supra* and *In Re Richards Estate supra.* The opinion in the instant case completely ignores the established rules regarding objections. If the defendant should be required to lay a proper foundation for an opinion, the plaintiff should be required to make the proper objection. It is respectfully submitted that this court should grant a rehearing to permit argument on this matter.

POINT II.

THE PATROLMAN'S TESTIMONY ON POINT OF IMPACT WAS NOT PREJUDICIAL.

Patrolman Sherwood's testimony on the point of impact was cumulative evidence. Both Henry Kelly and his son Robert Kelly testified the impact occurred on the west (defendant's) side of the highway.

Henry Kelly stated:

A. (Mr. Kelly) Well, I am positive that the Chevrolet truck was no less than one half of its—of the entire width was across on the west side. Now, I am positive of that, at least of that much. (R 33)

Robert Kelly testified:

Q. (Mr. Nebeker) Do you have a judgment as to how far west of the center line the point of impact was between the truck and the Greenbriar?

A. (Robert Kelly) I would say about half way.

Q. Half of—

A. Half of the—

Q. Width of the car?

A. Half of the width of the road. (R 384)

There is no question about the admissibility of the testimony of Henry Kelly and Robert Kelly. They were both eye witnesses to the accident. Since that evidence was properly received, the only effect of the Patrolman's testimony was cumulative. The erroneous admission of evidence will not be considered reversible error where the only effect of the evidence is cumulative.

> "*The erroneous admission of evidence will not be considered reversible error by the appellate court where the only effect of the evidence is cumulative to evidence properly received or facts admitted by the appellant.* And the erroneous admission of evidence becomes immaterial if the point involved has been proved by adequate and direct testimony or where it adds little if anything to the facts otherwise established in the record, particularly where the facts otherwise established amply justify the factual and legal conclusions of the court. * * *"
> 5 Am Jur 2d Sec. 800, p. 241. (Italics ours)

See 5A C.J.S. Sec. 173 (b) page 1018; *Schofield v. Zions Co-op Mercantile Institution* 85 Utah 281, 39 P.2d 342 (1934) (Holding erroneous admission of evidence will not be considered reversible error when the effect of the evidence is cumulative).

It is respectfully submitted that the testimony of the patrolman could not possibly have been prejudicial in view of the affirmative testimony of the Kellys.

In Zelayeta v. Pacific Greyhound Lines 232 P.2d 572 (Cal. 1951) when an officer's opinion on point of impact was admitted the court held it could not have been prejudicial stating:

> "Appellants argue the question of the admissibility of Edward's (police officer) opinion as if it were the most vital evidence in the case. They greatly overemphasize and exaggerate its importance. Edwards had testified, as did several other witnesses, as to what he observed at the scene of the accident. On direct examination he gave the reasons upon which his opinion was predicated. Eye witnesses testified as to the point of impact. Two other officers, at least equally competent, gave contrary opinions based upon the same facts. The jury had all this evidence before it. Under these circumstances, assuming that it was error to permit Edwards to give his opinion as to the point of impact, such error could not have been prejudicial. The transcript in this case covers some 1620 pages. A great deal of this record is devoted to the issue of where and how the collision occurred. The case was hotly contested and well tried on both sides. During such a trial it would be a rare occurrence indeed

> if some error in the admission or exclusion of evidence did not occur. * * * *After reading this record we are convinced that Edwards' testimony, whether rightfully or wrongfully admitted, played a very minor part in the ultimate determination of the case.* (Italics ours)

The testimony of patrolman Sherwood played a very minor role in the ultimate determination of this case. It is particularly true in view of the patrolman's voluntary statement that his opinion was "no good." (R. 184)

POINT III.

THE COURT ERRED IN HOLDING THERE WAS NO PROPER FOUNDATION TO SUPPORT THE TESTIMONY OF PATROLMAN SHERWOOD.

This court held in the instant case that a trial judge, *in his discretion,* may permit a qualified expert to give his opinion as to the point of a collision when a proper foundation for the opinion has been laid.

Sherwood's qualifications as an expert in accident investigations were not questioned. A review of Sherwood's testimony shows there is ample evidence to support his opinion as to the point of impact.

Sherwood was standing less than ten feet from the accident when it happened.

Q. (Mr. Beesley) Do you have an opinion as to how far from the center of the road you were standing?

A. (Patrolman Sherwood) About ten feet. (R 179)

Sherwood's attention was drawn to the impact by the noise being so close to him.

Q. (Mr. Beesley) What was the first thing that occurred that drew your attention that an accident had happened?

A. (Patrolman Sherwood) The noise of the impact being so close to me. (R 177)

Sherwood was practically an eye witness to the collision as he turned in less than a second and saw the Davis vehicle take off down the pavement, skid and then roll over one complete turn.

Q. (Mr. Beesley) All right. Would you describe the sequence of events after you heard the noise?

A. (Patrolman Sherwood) The noise was more to my rear and to my right, so I just turned to the right and saw this Davies vehicle taking off down the pavement on the right or east side of the highway and it travelled some distance, and then it turned sideways and skidded and then rolled one complete turn. (R 177, 178)

Sherwood went to the drawing board and drew the skid marks left by the Davies vehicle after the impact, the position of the Davies vehicle when he first saw it, where the Davies vehicle came to rest, where he was standing on the highway, where the other vehicles were on the highway and where the patrol car was located. (R 178, 179)

Sherwood measured the distance from the point of impact to where the Robert's vehicle and the defendant's vehicle came to rest.

Q. (Mr. Beesley) Now, where did the Roberts vehicle come to rest?

A. (Patrolman Sherwood) About three hundred and ten feet on down the highway from this point that he—the two of them came together.

Q. Three hundred ten feet down the highway?

A. Yes.

Q. And from what point did you measure three hundred ten feet?

A. *From a point near the center of the highway just back of where I was standing.*

Q. I see. And where did the Mitchell vehicle come to rest?

A. It went on towards the south about a hundred and fifty feet from the same point and pulled off on the right hand side of the road, as the photo will so indicate.

Q. How were these measurements taken?

A. By tape measure. (R 178) (Italics ours)

Sherwood measured the distances to each vehicle from a point near the center of the highway just back of where he was standing. The patrolman examined the roadway where the two vehicles collided.

Q. (Mr. Nebeker) I see. Now, you did examine the roadway where these two vehicles had collided, did you not?

A. (Patrolman Sherwood) Yes.

Q. And you found that there was considerable debris on the road there, did you not?

A. Well, I wouldn't know about the considerable amount, but there was debris.

Q. From your examination of the road, you made a determination as to the approximate point of impact, did you not?

A. Yes. (R 182)

The patrolman examined the two vehicles involved in the collision.

Q. (Mr. Nebeker) Did you examine the side of the '49 Chevrolet to determine what damage had been done to it?

A. (Patrolman Sherwood) Yes.

Q. Well, first of all, let me ask you if you saw the Roberts car or the Davies car—I believe it was owned by Mr. Davies, was it not?

A. Yes.

Q. And driven by Mr. Roberts. Did that car make a complete roll-over?

A. Yes.

Q. And was it damaged on all sides?

A. It was pretty well damaged on both sides and the top and the windshield because it made one complete roll.

Q. Was the windshield cracked, split?

A. I am sure it was. I can't be positive at this time.

Q. Did you ever see the Corvair driven by Mr. Mitchell after the impact occured?

A. Yes.

Q. Did you examine that car?

A. Yes.

Q. Could you tell us what damage appeared to be on the Corvair?

A. It was scraped pretty well from the—the entire left side of the body, tearing off some of the chrome molding and gouging it rather deeply. I don't believe there was any place that it went clear through the body, but it scraped the paint off the full length of it. (R 185)

Sherwood had a conversation with Mr. Roberts after the accident happened.

Q. What did Mr. Roberts say when you asked him whether he had seen the lights of the officer's car?

A. He said he didn't see them.

Q. Did you ask him if he realized that there had been an accident there?

MR. BEESLEY: Same objection.

THE COURT: The objection is overruled. You may answer.

A. I am sure I did.

Q. What did he answer?

A. He said he didn't see any of them.

Q. Didn't see anything?

A. I'm not sure if that is the words he used, but basically that was his answer. (R 188)

Sherwood also examined the photographs of the accident scene taken by Sheriff Jackson to refresh his memory as to the collision. (R 175)

A review of all of the patrolman's testimony clearly shows the trail court did not abuse its discretion in permitting the patrolman to testify as to the point of impact. This is particularly true in view of the fact no objection was made to the patrolman's testimony on the ground a proper foundation had not been laid. This court has previously held that a trial court must be allowed a considerable latitude of discretion when confronted with the question of admissibility of expert opinion testimony. See *Webb v. Olin Mathieson Chemical Corp.*, 9 Utah 2d 275, 342 P. 2d 1094 (1959); *Joseph v. W. H. Groves Latter Day Saints Hospital*, 7 Utah 2d 39, 318 P. 2d 330 (1957).

When a trial judge, in the use of his discretion, has permitted an expert to state his opinion, the decision of the trial judge should be sustained unless it clearly appears that he was in error in his judgment. The record in the instant case affirmatively shows that the trial court did not abuse its discretion, but properly permitted the patrolman to state his opinion as to the point of impact.

CONCLUSION

This court has held that a specific objection to opinion testimony was properly overruled but that an objection which was never made should have been sustained. In all fairness and justice defendant and the trial court should have been given an opportunity to correct the alleged error. This court has previously held that a specific objection is only good on the ground stated. The objection to "any opinion" did not raise the question of foundation. The objection was based on the theory that the opinion went to the very issue to be decided by the jury. This court has previously held that such an objection is without merit. The trial court properly overruled the objection to "any opinion" and permitted the patrolman to testify on the point of impact to help the jury determine what happened.

The patrolman's testimony on point of impact was not prejudicial in view of the eye witness testimony of Henry Kelly and Robert Kelly. The testimony of the patrolman was only cumulative, and if its admission was error, it was not prejudicial.

A full review of Sherwood's testimony clearly shows there was abundant evidence to support his opinion. The record shows that Sherwood heard the sound of the collision, saw one of the vehicles immediately after impact as it careened down the highway, saw the skid marks left by the plaintiff's vehicle, examined the debris on the road, examined the vehicles, talked to the driver of the plaintiff's vehicle, made measurements and placed all the information

on a drawing board before the jury. All these facts, when considered together, clearly show the trial court did not abuse its discretion in permitting the patrolman to testify on the point of impact.

For the foregoing reasons defendant earnestly requests this court to grant a rehearing.

Respectfully Submitted,

RAY, QUINNEY & NEBEKER
Stephen B. Nebeker
Attorneys for Petitioners